flict on the availability of prejudgment interest under the latter statute.

Petitioner argues (Pet. 16-17) that the stocks he embezzled were not sufficiently analogous to the other income-producing assets for which courts have routinely permitted prejudgment interest. In his view, the instruments in those cases were interest-bearing, unlike the embezzled stocks here. Petitioner, however, cites no court of appeals (or even a district court) decision that has drawn that distinction or has denied prejudgment interest under the circumstances presented here. Nor does he explain why this particular form of lost income does not warrant an award of prejudgment interest under the terms of the statute. The Restitution Act specifically commands courts to order restitution in the "full amount of each victim's losses," 18 U.S.C. 3664(f)(1)(A), and that loss includes "lost income," 18 U.S.C. 3663A(b)(4). Awarding prejudgment interest on income lost because of the theft of valuable assets, like the stocks embezzled here, ensures that the restitution award reflects the "full amount" of the victim's loss of income-generating assets and the "lost income" caused by the crime.

2. Petitioner also seeks (Pet. 21-29) this Court's review of the district court's calculation of the date of loss for the Terayon stocks. The record-bound determination of when Cisco's "loss" of the value of its embezzled stocks occurred does not warrant this Court's review. Petitioner cites no contrary authority interpreting the Restitution Act's "date of the loss" provision with respect to embezzled securities.

Petitioner's contention (Pet. 22-25) that the court could consider only the market value of the shares on the date of embezzlement overlooks that Congress

amended the Victim and Witness Protection Act in 1994 to make clear that restitution awards "in any case" may include an award to "reimburse the victim for lost income," 18 U.S.C. 3663(b)(4). See Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1947. That same provision was carried forward in the Restitution Act. 18 U.S.C. 3663A(b)(4). Almost all of the cases upon which petitioner relies (Pet. 25-26) predate that significant statutory enhancement in the courts' authority to compensate a victim for lost income.

United States v. *Simmonds*, 235 F.3d 826 (3d Cir. 2000) (cited at Pet. 25), is of no help to petitioner. That case, in fact, rejected an exclusive focus on the market value of an asset at the time of the crime. The court held that the restitution order reasonably reflected the later replacement value, rather than market value at the time of the crime, of furniture destroyed in an arson. *Simmonds*, 235 F.3d at 832; see also *United States* v. *Shugart*, 176 F.3d 1373, 1375 (11th Cir. 1999) (cited at Pet. 26) (upholding award of replacement value for burned church building).

The court of appeals in *Simmonds* also held that the district court erred in ordering restitution for the loss of discounted insurance policy premiums (*i.e.*, lower premiums) occasioned by the victim's filing of an insurance claim. But that was because the court held that those lost discounts were not "property" that was "damaged[,] lost or destroyed" by the defendants' criminal acts. 235 F.3d at 833. Rather, they reflected indirect, consequential damages, which the Restitution Act does not permit. *Ibid.* Here, by contrast, the district court did not abuse its discretion in concluding that the income lost by Cisco due to petitioner's embezzlement of income-generating stocks both was property and was properly compensable

"lost income" directly caused by petitioner's crimes. In any event, the district court's case-specific calculation of the date of loss for the Terayon stocks in this case—a finding that was sustained by the court of appeals only on the ground that it did not amount to an abuse of discretion, rather than as a rule of law that would control future restitution awards in that circuit, Pet. App. 16—does not present the type of broadly recurring legal question that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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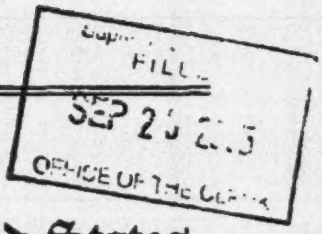

In The

Supreme Court of the United States

ROBERT S. GORDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I.

The Ninth Circuit's Decision Ordering Petitioner to Pay "Prejudgment Interest" as Criminal Restitution Conflicts with Decisions of the Third, Fourth, Fifth, Seventh and Tenth Circuits

A. The Ninth Circuit's Decision Conflicts with the Decisions of Other Circuits Because it Orders Pre-Judgment Interest on a Non-Interest Bearing Asset

The criminal restitution order in this case, as modified and affirmed by the Ninth Circuit, directs Petitioner Robert S. Gordon to pay Cisco Systems, Inc. more than $2,000,000 as "prejudgment interest," *in addition to* the amount he is required to pay for the "value of the property" (*i.e.*, stock and cash) he embezzled.[1] Pet. App. 22, 25-26.

The Government asserts "there is no conflict in the circuits" because decisions of other circuits have upheld restitution orders that included an amount for interest. Opposition Brief 6 (citations omitted). The Government itself acknowledges that assertion is overstated, when it later states "[t]here is . . . no conflict on the *availability* of prejudgment interest . . . " under the MVRA.[2] Opposition

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[1] The Government's Brief reflects its mistaken understanding that Petitioner was ordered to pay prejudgment interest only as to the securities he embezzled which Cisco had liquidated. Brief for the United States In Opposition ("Opposition Brief") 6, n.* Petitioner was also ordered to pay "prejudgment interest" as to the cash distributions he misappropriated. Pet. App. 25 (prejudgment interest appropriately awarded "for the embezzled cash . . . ").

[2] Referring to the Mandatory Victims Restitution Act of 1996 ("MVRA"). Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Brief ("Opposition Brief") 7-8 (emphasis added). Even that more limited assertion is in error, however, as decisions of the Fifth and Third Circuits hold interest may not be ordered as criminal restitution because "[c]riminal penalties do not bear interest." *United States v. Rico Indus., Inc.*, 854 F.2d 710, 714 (5th Cir. 1988) *and United States v. Sleight*, 808 F.2d 1012, 1020 (3d Cir. 1987). The Government's contention that those cases are inapplicable to the MVRA because subsequent decisions of the Third and Fifth Circuits said that restitution under the Victim Witness and Protection Act of 1992, 18 U.S.C. 3663 "is compensatory rather than punitive" (Opposition Brief 7 (citations omitted)) is without merit because "restitution under the MVRA is a form of criminal penalty rather than civil redress." *United States v. Edwards*, 162 F.3d 87, 91 (3rd Cir. 1998) *citing and quoting*, S.Rep. No. 104-179, 1996 U.S.C.A.N. 924, 925-926, 930-931.

The Third and Fifth Circuit decisions would not prohibit interest being included in the restitution ordered to be paid for the "value of the property." 18 U.S.C. § 3663A(b)(1)(B); *see* Pet. App. 33 (Fernandez, J., dissenting). They do, however, prohibit "prejudgment interest" being added to a restitution order as a separate item as was done here.

The Government's assertion that courts have "consistently upheld the award of prejudgment interest for losses associated with income-producing assets" is an overgeneralized description of the case law that masks the conflict between the Ninth Circuit and the Fourth, Seventh and Tenth Circuits. *See* Pet. 16 (citing cases). Opposition Brief 6. Judge Fernandez's dissent more narrowly and more accurately summarized prior cases as granting interest only "where the property taken was 'money,' and

that money was being loaned at a given interest rate or was contained in an interest bearing account or instrument." Pet. App. 32 (Fernandez, J., dissenting) (citations omitted).

The Government's assertion that no court has drawn the distinction as to an asset being interest-bearing in ordering interest to be paid as restitution is simply wrong. Opposition Brief 8, *see, e.g., United States v. Shepard*, 269 F.3d 884, 886 (7th Cir. 2001) (money stolen from interest bearing account); *Govt. of Virgin Islands v. Davis*, 43 F.3d 41, 46-47 (3d Cir. 1994) (loss of interest on stolen certificates of deposit). Nor does the absence of a published decision denying "prejudgment interest under the circumstances presented here" (Opposition Brief 8) mean there is not a conflict in the circuits. The conflict here is not between a decision in one circuit that denies interest on the same facts on which another circuit grants interest; rather, the Ninth Circuit's decision conflicts with the decisions of the Third, Fourth, Fifth, Seventh and Tenth Circuits in that (1) it grants interest in the absence of an interest-bearing asset, whereas the other circuits grant interest only where there is an interest-bearing asset, and (2) it relies on the corporate character of the victim as the basis for ordering interest, whereas the decisions of the other circuits rely on the nature of the asset. Pet. App. 25 ("As a corporation," Cisco is "eligible for prejudgment interest restitution . . . ,").

B. The "Lost Income" Provision of Section 3663A(b)(4) Does Not Provide an Alternative Basis for Upholding the Award of Prejudgment Interest

The Government suggests review is not warranted because the prejudgment interest could have been ordered to be paid as "lost income" under section 3663A(b)(4).[3] Opposition Brief 8. The Government cites no decision in which prejudgment interest has been ordered as "lost income," and neither Cisco, nor the Government on behalf of Cisco, ever attempted to argue or establish it was entitled to "lost income" restitution. The award for prejudgment interest could not have been based on the "lost income" provision in any event, because the restitution to be ordered for loss of property is specified by section 3663A(b)(1). The lost income provision of section 3663A(b)(4) does not replace, supercede or negate the restitution that section 3663A(b)(1) specifies is to be ordered for the loss of property, but rather makes restitution available for another type of loss.

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[3] Section 3663A(b)(4) provides that the order of restitution shall require the defendant "(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense."

II.

The Ninth Circuit's Decision Ordering Restitution for "Lost Opportunity" Profits Conflicts with Decisions of the Third, Fourth and Fifth Circuits

The restitution Petitioner should have been ordered to pay for the embezzled Terayon shares was the value of the shares on the date they were embezzled, $6,523,250. Excerpts of Record 53, 18 U.S.C. § 3663A(b)(1)(B)(i)(I). Instead, the district court ordered restitution of $12,593,902.23, because it awarded restitution to Cisco for its lost opportunity to make additional profit by selling the shares at a higher price. Pet. App. 36.

The Government opposes review by asserting the district court's "record-bound determination of when Cisco's 'loss' of the value of its embezzled shares occurred does not warrant this Court's review." Opposition Brief 8. The district court did not determine when "Cisco's 'loss' of the value of its embezzled shares occurred"; rather, it sought to determine when Cisco would have sold the shares had they not been embezzled, in order to calculate Cisco's "lost opportunity" to make additional profit. Pet. App. 36. Moreover, the issue as to which Petitioner seeks review is not whether the district court's "record-bound determination" as to when Cisco would have sold the shares had they not been embezzled is correct, but the legal question of whether "lost opportunity" is a permissible measure of restitution for an offense involving the loss of property. Pet. 21-25.

The Government opposes Petitioner's claim that review is warranted as to the Ninth Circuit's interpretation of "the date of the . . . loss" provision on the ground that Petitioner "cites no contrary authority interpreting

the Restitution Act's 'date of loss' provision with respect to embezzled securities." Opposition Brief 8. The statute treats all property uniformly (and with good reason, as it advances the goal of streamlining criminal restitution) and thus the contrary decisions cited by Petitioner, while not involving securities, are of the same significance. Pet. 26, *citing*, *United States v. Shugart*, 176 F.3d 1373, 1375 (11th Cir. 1999) and *United States v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992). The Government's failure to cite any decision that orders restitution based on the value of the property on a date other than its loss or on the date of sentencing provides further confirmation that the Ninth Circuit's ruling in this case that "the date of the . . . loss" is a flexible concept to be interpreted on a case-by-case basis conflicts with existing precedent.

The Government also seeks to avoid review on this issue by relying on the same "lost income" provision that it offered as an alternative basis for ordering prejudgment interest. Opposition Brief 8-9. The Government relies on this same provision in an attempt to discredit the cases relied on by Petitioner by noting that Congressional authorization for restitution for "lost income" "in any case" first became available in 1994, and "[a]lmost all of the cases upon which Petitioner relies predate that significant statutory enhancement in the courts' authority to compensate a victim for lost income." Opposition Brief 9. The lost income provision has no bearing on this case or Petitioner's reliance on the pre-1994 cases he cited for the same reasons explained above. *See*, p. 4, *supra*.

The Government's assertion that *United States v. Simmonds*, 235 F.3d 826 (3rd Cir. 2000) "is of no help to petitioner" refers not to the ruling in *Simmonds* that Petitioner cited as support, but the court's ruling upholding the district court's order of restitution for furniture

destroyed in a fire in an amount equal to its "replacement value," rather than its "market value." 235 F.3d at 832. The Government is correct that the court "rejected an exclusive focus on the market value of an asset at the time of the crime," but that aspect of *Simmonds* has no relevance here because the parties agreed market value was appropriate. The ruling has relevance here only in that the Third Circuit never questioned that the replacement "value of the property" was to be determined as of "the date of the damage, loss or destruction." Sec. 3663A(b)(1)(B); *Simmonds*, 235 F.3d at 831-33.

The Government seeks to discredit Petitioner's reliance on *Simmonds'* ruling denying restitution for the victims' lost insurance premium discounts as support for his position that "lost opportunity" restitution is improper by asserting the court in *Simmonds* denied restitution because it held the "lost discounts" "were not 'property' that was 'damaged[,] lost or destroyed' by the defendants' criminal acts," and instead "reflected indirect, consequential damages, which the Restitution Act does not permit." Opposition Brief 9. The court in *Simmonds* did not, as the Government suggests, rest its ruling on the absence of a causal connection between Simmonds' crime and the victims' lost insurance premium discounts. The court itself stated that "[t]he victims' lost insurance premium discounts are unquestionably a result of the defendant's criminal conduct." *Simmonds*, 235 F.3d at 834. Moreover, the court expressly stated that it was denying restitution for the lost insurance premium discounts because they "*do not in any way constitute or represent* 'the value of the property' lost, damaged or destroyed as a result of Simmonds's crimes." 235 F.3d at 834 (emphasis added).

The *Simmonds* court did say that "under § 3663A . . . the victims lost insurance premium discounts are consequential damages," but that is because the Third Circuit had previously interpreted the term "'property' in § 3663A(b)(1), as not including consequential damages." *Simmonds*, 235 F.3d at 834, *citing Govt. of Virgin Islands v. Davis*, 43 F.3d 41 (3d Cir.1994). Under Third Circuit precedent, Cisco's lost opportunity profits would be deemed to "not in any way constitute or represent 'the value of the property' lost, damaged or destroyed as a result of [Petitioner's] crimes," and would also be deemed to be "consequential damages." *Simmonds*, 235 F.3d at 834. The Government's assertion that the contrary ruling in this case was proper on the ground that "the district court did not abuse its discretion in concluding that the income lost by Cisco due to petitioner's embezzlement of income-generating stocks both was property and was properly compensable 'lost income' directly caused by petitioner's crimes," (Opposition Brief 9-10), merely confirms the existence of the conflict in the circuits and the need for review.

CONCLUSION

The petition for certiorari should be granted, and the order for prejudgment interest restitution should be ordered vacated and the lost opportunity restitution for the Terayon shares should be ordered vacated and